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Al & John, Inc., d/b/a Glen Rock Ham and Noel Echavarria Gonzalez. Case 22–CA–27477

May 23, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On February 13, 2008, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) when it discharged employee Noel Echavarria Gonzalez. In doing so, we rely on the following factors. First, Echavarria Gonzalez engaged in union activity by circulating a union petition among other employees. Second, the Respondent had knowledge of that activity because Plant Manager Jon Udrija observed Echavarria Gonzalez circulating the petition. Finally, the Respondent's proffered reasons for the discharge were pretextual, as demonstrated by the fact that on the day before it discharged him, the Respondent disciplined Echavarria Gonzalez for purported workplace misconduct on a day that the evidence of record reflects Echavarria Gonzalez did not work. The Respondent's explanation for discharging Echavarria Gonzalez the next day relied in part on that pretextual discipline. Board precedent provides that unlawful motivation may be inferred from circumstantial evidence, including evidence that the employer's stated reasons for its actions were pretextual. See, e.g., *Whitesville Mill Service Co.*, 307 NLRB 937 (1992) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). Where, as here, the evidence establishes that the reasons given for the discharge were pretextual—that is, were either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

Given our finding that the Respondent's reasons for the discharge were pretextual, we need not rely on the judge's findings as to whether the Respondent failed to act according to a disciplinary policy.

In his cross-exception and supporting brief, the General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. Having duly considered the matter, we are not prepared at this

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Al & John, Inc., d/b/a Glen Rock Ham, Paterson, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. May 23, 2008

Peter C. Schaumber,	Chairman
Wilma B. Liebman,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Dorothy Foley, Esq., for the General Counsel.

Alan I. Model, Esq., (*Littler Mendelson*), of Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Newark, New Jersey on October 23 and 30, 2007. The Complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, discharged employee Noel Echavarria Gonzalez because of his Union activities and engaged in unlawful surveillance of those activities. The Respondent asserts that the employee was discharged for cause.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following.¹

time to deviate from our current practice of assessing simple interest. See, e.g., *Rogers Corp.*, 344 NLRB 504 (2005).

No party excepts to the judge's finding that the Respondent did not violate Sec. 8(a)(1) of the Act by engaging in unlawful surveillance of Echavarria Gonzalez.

The judge inadvertently stated that the Respondent's written warning to Echavarria Gonzalez referenced "01/01/2006." The correct date is "07/01/2006."

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

¹ The record is hereby corrected so that at page 9, line 14, Ms. Foley was speaking; at page 24, line 5, and thereafter throughout the transcript the correct name is Blanco; at page 119, line 10, the first sentence should read, "Nobody is disciplined for a warning."; at page 126, line 11 and thereafter, the correct name is Eduardo Blanco; at page 140, line 10, the correct phrase is "disciplinary warnings."

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the processing and sale of ham and related meat products at its plant in Paterson, New Jersey. Annually, Respondent purchases and receives at its Paterson facility provisions and goods valued in excess of \$50,000 directly from points outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act and that Local 464A, United Food & Commercial Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The parties agree that the following are supervisors and agents of Respondent within the meaning, respectively, of Section 2(11) and 2(13) of the Act:

John Udrija	Plant Manager
Alexander Oldja	President
Eduardo Blanco	Supervisor

The plant at issue herein manufactures hams and emulsified meat products. For purposes of this decision a very brief description of the process is required. Various types of raw hams and other products are prepared by the plant butchers and are then cooked in metal molds. The empty molds weigh about 15 lbs. Clean molds must be transported to the work areas where they will be filled and once the molds are filled they must be transported to the cook room. Clean molds are stacked on large metal carts; witnesses testified variously that from 100 to 250 empty molds could be stacked on each cart. The carts are 8 to 10 feet long and have four wheels. A cart full of clean molds is of a height that a man cannot see over the top. Such a cart is very heavy and must be moved using a battery powered jack.² The arms of the jack are inserted into the cart so as to raise one end of the cart and then the cart is pulled to the desired location. Full molds are placed into a container called a basket; these are not relevant to the instant case.

Jon Udrija has been the plant manager of the company for 25 or 26 years. He oversees all activities on the production floor. The witnesses herein agreed that Udrija regularly visits the production floor.³ The company employs about 200 production workers. The plant produces about 10,000 hams on an average day. There are 3 foremen in the plant: the foreman of butchers is Milan Madjarcic; the foreman of the processing employees is Anton "Tony" Marinescu; the foreman of ready-to-eat products is Eduardo Blanco.

Local 464(A), UFCWU, represents a unit of butchers at the facility. Employees who are not butchers are not included in the unit. Charging Party Noel Echavarria Gonzalez worked transporting ham molds to various locations around the plant and he was excluded from the bargaining unit.

On December 16, 2005 OSHA conducted an inspection of the plant. A Citation and Notification of Penalty was issued on March 27, 2006. The violations found concerned faulty equipment, dangerous physical conditions in the plant and the failure to evaluate powered truck operators' performance at least once every three years. In May 2006 OSHA met with plant officials including Jon Udrija and Jennifer Oldja.⁴ Udrija testified that at this meeting OSHA directed the company to keep records of safety violations. Udrija said he had been giving mostly verbal warnings but OSHA said that he should document these warnings. As a result, Udrija stated, "I started to be a little more careful and document the warnings that I gave to employees."

A stipulated settlement amending the proposed OSHA penalties was signed by Jennifer Oldja on June 6, 2006. The company agreed to implement a safety and health program and to provide training concerning the program to all employees. Jennifer Oldja testified that at the time of the hearing the company was in the process of publishing a safety program and that it had issued a brochure in March 2007.

Udrija testified concerning the Respondent's disciplinary policy. He said, "Nobody is disciplined for a warning." However, if the same problem occurred again, if the employee did not correct the problem, he would be subject to suspension or termination. Udrija stated that he gives a warning but if the problem continues then the employee is subject to termination.

B. Noel Echavarria Gonzalez

Echavarria Gonzalez started working at the plant on July 13, 1997.⁵ After some preliminary assignments he began driving the electric jacks around the plant.⁶ Echavarria Gonzalez testified that his job included retrieving carts with empty molds from an area where they are stored and taking the carts to a line where 10 or 11 employees fill the molds. Because of the size and weight of the carts, they must be moved to the line one at a time. In addition, when taking a cart from the area where the carts are stored care must be used to move only one cart at a time to avoid flipping it over. Echavarria Gonzalez testified that in the 7 years he has been moving carts he has not received any warnings in connection with this task.

Echavarria Gonzalez' regular shift is from 6 am to 2:30 pm. However, he often works overtime depending on how much meat must be processed by the plant each day. Plant manager Jon Udrija determines the production for each day and the plant operates until the production goal for the day is met. Echavarria Gonzalez usually works overtime until he has supplied the line for which he is responsible with enough molds to finish the day's work. If he cannot work overtime on a certain day, he notifies his supervisor that day or the day before.

The Bonus Issue

Echavarria Gonzalez testified that the unrepresented employees were given a bonus every year after Thanksgiving Day. The practice at the plant was to grant non-union employees a bonus when the unit employees received the bonus specified by their

² Some witnesses referred to this equipment as a power pallet jack.

³ Foreman Eduardo Blanco testified that Udrija is always on the work floor so that he can see what is happening throughout the day.

⁴ Oldja is the chief financial officer of the Respondent but her duties are more wide ranging than her title would suggest.

⁵ Echavarria Gonzalez testified through an interpreter.

⁶ Echavarria Gonzalez was trained and certified to use the jack.

collective bargaining agreement. In June 2006, the Union and the employer negotiated a new contract and there were rumors in the plant that the new contract provided for a bonus in June. Indeed, on Friday, June 30, the unit employees received bonus checks with their paychecks and this was noted by the non-unit employees. However, the unrepresented employees soon became angry and upset when they realized that they were not being given bonus checks.

Rafael Adames, a non-unit employee, testified that he had heard from Union shop steward Idaver "Eddie" Memetov that the new contract provided for an extra bonus in addition to the traditional end-of-year bonus. At first, the unrepresented employees were happy because they believed that they too would get the mid-year bonus. On June 30, 2006 when it became clear that only the unit employees had received a bonus check, Adames and the other unrepresented employees called plant manager Jon Udrija to the work area and asked why they did not get the bonus. Adames testified that Udrija turned red and looked upset. Udrija said, "I never told you I was going to give you a bonus." After the employees pointed out that every year they got the same bonus as the Union employees, Udrija repeated that he had never promised them a bonus. Adames stated that following this exchange with Udrija the employees got together and decided to organize themselves so that they could receive benefits. The employees all thought, "We're worthless. We're nobody." Adames signed a list of employees who wanted to organize that Echavarria Gonzalez circulated in the plant.

Echavarria Gonzalez testified that on June 30 he put his name on a list and he solicited signatures by telling the employees that they had to join the Union to be able to receive the same benefits as the unit employees.⁷ He collected signatures for the list during work time on the plant floor and in the break room. This effort continued on Monday July 3 and Wednesday July 5. Echavarria Gonzalez testified that he saw Udrija watching him while he collected signatures from his fellow employees. After a while, Echavarria Gonzalez confined his solicitation to break times because he did not want Udrija to see him. Echavarria Gonzalez called the Union to tell it of his activities and that he would be sending in a petition. He made these calls beginning on June 30 and continuing on July 3 and 5. He told the person to whom he spoke at the Union that he was being watched. This person replied that the company could not watch him and that he was to go to the NLRB if anything happened.

Echavarria Gonzalez intended to send the list of employees to Local 464(a) to show that the signatories wished to become Union members and receive the same benefits as the unit employees. As will be seen below, he sent the original to the Union on July 5. Echavarria Gonzalez retained copies of only some of the pages he sent the Union. In fact, Adames could not find his signature on the pages that Echavarria Gonzalez had copied and which were introduced into evidence. I do not find this significant. Adames testified that he did sign a list of employees who wished to join the Union. Echavarria Gonzalez testified that there were many pages to the list, for a total of about 40 signatures. After he had collected the signatures Echavarria Gonzalez wrote at the top of one page that all the

employees wished to belong to the Union. He did not have the sophistication or forethought to retain an exact copy of what he had sent to the Union. However, the precise contents or wording of the list are not central to the instant case. What is significant is that two witnesses testified credibly that Echavarria Gonzalez collected a list of signatures at the plant in an effort to show that the employees wished to join the Union and receive the benefits of Union membership. In addition, Echavarria Gonzalez' telephone records indicate that he called the Union on June 30 and July 3 and 5.

The Written Warning

On Wednesday July 5, Echavarria Gonzalez testified, Jon Udrija handed him a written warning. The warning, dated July 1, was as follows

On Saturday 01/01/2006 you were noticed pushing, with power pallet jack, several carts loaded with molds. This could result in injury of another employee who may be on the opposite side and also damageing (sic) the molds and carts.

If you continue to be desobedient (sic) and careless it may result in termination of employment.

Echavarria Gonzalez, who was the first witness called in this proceeding, testified that he was not at work on Saturday, July 1, 2006. Respondent's payroll records show that he was not working that day. Echavarria Gonzalez stated that he did not know why Udrija gave him the July 1 warning; he thought it was because he was collecting signatures for the Union. He denied that Udrija had ever warned him verbally to be careful. If there had been an accident he would have been fired. Echavarria Gonzalez said that he never moved more than one mold cart at a time because moving multiple carts could cause them to fall and injure someone.

After Echavarria Gonzalez testified on direct examination and before Udrija testified, Jennifer Oldja testified about a conversation she had with Udrija outside the courtroom during a break in the instant proceeding. Oldja stated that she alerted Udrija about the date of July 1 2006 because Echavarria Gonzalez claimed he had not worked that day and she wanted to be sure that the company produced the payroll records.

Udrija testified later in the hearing. He stated that on July 1 he had seen Gonzalez using the power pallet jack to push several carts loaded with empty molds out of the way so that he could reach certain carts containing the molds needed for a certain line.⁸ Udrija said he stopped Gonzalez immediately and told him he could not see who was standing in the area behind the carts and he could kill someone or damage the equipment. Udrija stated that Gonzalez was pushing at least 3 carts at the same time. Udrija recalled that this incident occurred on a Saturday. Udrija testified that he wrote the warning at a later date and gave it to Echavarria Gonzalez on July 3. He said he had spoken to Gonzalez many times about safety issues but in the past he did not issue many written warnings. Since the OSHA visit he gave more written warnings. Udrija testified that when he gave Echavarria Gonzalez the written warning he did not

⁷ The unrepresented employees eventually received a bonus in July.

⁸ Jon Udrija testified after Echavarria Gonzalez was examined on direct and cross-examination.

know that the latter had been collecting signatures in an attempt to organize the employees.

Udrija did not explain how he could have observed Echavarria Gonzalez engaging in the unsafe maneuver on Saturday July 1 when it was clear that the employee had not worked that day. Udrija did not state that the incident could have taken place on another day; he remembered that it happened on a Saturday. Respondent offered no testimony or evidence to explain the discrepancy between Echavarria Gonzalez' attendance record and the purported July 1 incident which led to the written warning.

The Discharge

Echavarria Gonzalez went to the Paterson, New Jersey, Post Office on July 5 to mail the list of employees petitioning to join the Union.⁹ Echavarria Gonzalez believed that the Paterson Post Office closed at 4:30 pm and he wanted to mail the list of employees to the Union on that day. He testified that about 2:30 pm, when his shift ended, he informed the supervisor that he had to leave the plant.¹⁰ The events leading up to Echavarria Gonzalez' departure from the plant on that day are significant for the resolution of the instant case.

According to Echavarria Gonzalez the practice at the plant permitted him to notify the supervisor of his inability to work overtime either the day before or on the day of the intended early departure. In fact, Echavarria Gonzalez stated, it was permissible to wait until the end of the shift to inform the supervisor that one had to leave at that time. The purpose of informing the supervisor that he had to leave was to enable the supervisor to assign another employee to perform the tasks he would have performed had he stayed to work overtime. Adames testified that he would inform his supervisor the day before or in the morning if he had to leave work early. Adames also testified that he had left work on 4 or 5 occasions without asking permission. There is no indication in the record that Adames was disciplined for leaving work early without asking permission. Jon Udrija testified that if an employee cannot work overtime he must notify a foreman at least a couple of hours prior to going home or in the morning so that a replacement can be found. The company does not force employees to work overtime.

On July 5, 2006 Echavarria Gonzalez' foreman, Tony Marinescu, was on vacation. Echavarria Gonzalez testified that he notified foreman Eduardo Blanco that he had to leave at 2:30 on that day. It is clear from the record that the employer would regard notification to Blanco as sufficient in the absence of the regular foreman. According to Echavarria Gonzalez he received permission from Blanco to leave at 2:30; Blanco said, "No problem."

Jon Udrija testified that he learned that Echavarria Gonzalez had left the plant when he looked out of his office and noticed that employees on the packing line were sitting around with no

work because they had no empty molds. Udrija asked where Echavarria Gonzalez was and he looked for him in various locations without finding him. Udrija assigned another employee to supply the packing line with molds. He estimated that the production line was down from 30 to 35 minutes due to the lack of clean molds.

Jon Udrija called Echavarria Gonzalez at home and, receiving no answer, called his cell phone while the latter was standing in line at the Post Office. Udrija asked why he had left early. After Echavarria Gonzalez explained that he had to go to the Post Office, Udrija asked whether he had obtained permission. Echavarria Gonzalez replied that Blanco had given him permission to leave. Udrija said he would investigate and find out what happened. Udrija testified that he wanted to meet with Blanco "because he's the one that didn't follow up." Udrija was ready to reprimand Blanco at this point.

When Jon Udrija confronted Blanco, Blanco denied that Echavarria Gonzalez had told him about leaving early. Blanco testified herein that on July 5 he did not speak to Echavarria Gonzalez at all and the latter did not inform him that he had to leave early. Blanco stated that he himself had left the plant to pick up his daughter. Blanco said he was not sure what time he left the plant. He might have left work at 3:30 but he might have left earlier.¹¹ When Udrija spoke to Blanco it was on the latter's cell phone at around 4 pm.

When Echavarria Gonzalez came to work on July 6 he was told to wait for Jon Udrija in the shipping area. Eventually Udrija and Blanco appeared. Udrija asked Echavarria Gonzalez whether he had asked permission to leave the day before and the latter replied that he had indeed asked. Then Blanco said that Echavarria Gonzalez had not asked permission. Echavarria Gonzalez immediately said to Blanco, in Spanish, "How he could say such a thing." Blanco did not answer. Blanco testified that Echavarria Gonzalez said, "You work here and you're not going to say the truth."

Following this meeting Jon Udrija took Echavarria Gonzalez to a conference room where the two men met with company president Alexander Oldja. Echavarria Gonzalez testified that Udrija told the owner, "that I was the guy." Oldja said that Echavarria Gonzalez was being fired because he left without permission. Echavarria Gonzalez thanked Oldja for being allowed to work in the company and then remarked that, "I knew why I was being fired."

Jon Udrija testified that he told Alexander Oldja what had happened on July 5 when he and Echavarria Gonzalez met with Oldja. Udrija stated that he also informed Oldja that Echavarria Gonzalez had been given a safety violation. Oldja asked Echavarria Gonzalez why he left without telling anyone. According to Udrija at this point Echavarria Gonzalez became "a little loud" and said, "You guys don't believe me." Echavarria Gonzalez insisted that he had informed Blanco of his need to leave early but that Blanco did not want to admit it. Udrija recalled that Echavarria Gonzalez lifted up his hands and was walking toward the door. Udrija testified, "The decision between Alex and me was made then so we told him, as of today you're ter-

⁹ The certified mail receipt from the US Postal Service shows that the documents were mailed at 4:18 pm on July 5 and received by the Union on July 10, 2006.

¹⁰ Echavarria Gonzalez testified that he informed the supervisor he had to leave to go to the post office but his affidavit states that he said he had to go home. I do not find that this difference is significant.

¹¹ Blanco said he usually leaves at 3:30 but he could not say that he was still in the plant at 3:30 because he sometimes leaves earlier.

minated.” When he was asked when the decision to terminate Echavarria Gonzalez was made, Udrija replied that, “We made the decision when he started being loud and started walking out and we said as far as we’re concerned you’re terminated as of today.” Udrija said he did not know that Echavarria Gonzalez was circulating a list for the Union when this discussion took place. Alexander Oldja did not testify herein.

After this meeting on July 6 Udrija wrote up an “Employee Record.” This document, dated July 6, 2006 states in relevant part as follows

On Wednesday 07/05/2006 you left work at 2:30 PM, while the production line was running, without notifying your forman (sic).

This caused a lot of problem; other employees stopped their work waiting for you to supply them with ham molds, not knowing that you left already.

You were told that if you cannot stay longer you must notify your forman so he could find another employee who could replace your position.

You were counseled on Thursday 07/06/2006.

You stated that you did report to your foreman, Edward Blanco.

When I asked Blanco, in your presence, whether he received any notification from you, Blanco stated that you did not notify him at all that you have to leave at 2:30 PM.

After reviewing your previous warning on file, also due to causing down time on production line and stating a false statement I have no alternative choice but to terminate your employment with Al & John Inc.

Udrija testified that Echavarria Gonzalez did not have a history of leaving the plant without giving notice. Usually he would notify a supervisor if he had to leave before the daily production was completed.

C. Written Warnings Issued to Employees

The Respondent produced all the written warnings from its files. The warnings predating Echavarria Gonzalez’ discharge are summarized below. These warnings did not result in immediate termination:

11/26/2003	Leaving the packing line for 20 minutes to go to the locker room.
10/10/2005	Failing to wear proper safety shoes.
10/25/2005	Failing to wear proper safety shoes.
3/27/2006	Failing to report to work and failing to call; this is a repeat violation
3/23/2006	Failing to report to work and failing to call.
4/3/2006	Failing to report to work and failing to call.
4/5/2006	Failing to report to work and failing to call.
4/6/2006	Failing to report to work and failing to call.
4/10/2006	Failing to report to work and failing to call.
4/11/2006	Causing friction with another worker.
4/12/2006	Coming to work over one hour late; this is a repeat violation.

5/11/2006	Failing to report to work and failing to call. (Two employees.)
5/15/2006	Failing to report to work and failing to call.
6/1/2006	Starting lunch hour 17 minutes early; this is a violation.
6/19/2006	Failing to report to work and failing to call.
6/19/2006	Mixing clean and dirty molds.
6/30/2006	Riding power pallet jack too fast with potential to cause injury.
7/1/2006	Failing to report to work and failing to call. (Seven employees.)
7/3/2006	Failing to report to work and failing to call.

III. DISCUSSION AND CONCLUSIONS

I find that Echavarria Gonzalez was a truthful witness. Despite the difficulties of testifying through an interpreter he made an obvious effort to listen to the questions and to answer them fully. His testimony was supported by the documentary evidence with respect to his dates of work, the telephone calls to the Union and the mailing of the employee petition. Echavarria Gonzalez testified consistently as to the major facts at issue herein despite a vigorous and thorough cross examination by Counsel for Respondent. He remembered dates and occurrences and his recollection did not shift.

I credit the testimony of Adames. Adames gave the impression that he answered each question based on his actual recollection, he was cooperative on cross examination and no reason is apparent in the record for discrediting any part of his testimony.

I shall not rely on the testimony of Blanco and Udrija where it conflicts with the testimony of Echavarria Gonzalez. Blanco’s narrative is at odds with what I have found to be a truthful and reliable account of the events. Blanco did not have a good recall of the events of July 5. Blanco could not remember what time he left the plant that day. This leads me to conclude that he did not have an accurate recollection of whether Echavarria Gonzalez did or did not speak to him about leaving work at 2:30. As set forth in detail below, I find that Udrija’s testimony conflicts with the documentary evidence and that his stated reasons for the discharge are both shifting and inconsistent with his description of Respondent’s disciplinary policy.

I rely on Adames’ uncontradicted testimony that on June 30 the unrepresented employees confronted Udrija about the fact that they had not received a bonus with their paychecks. I credit Adames that Udrija turned red and looked upset and said he had never promised them a bonus. I credit Echavarria Gonzalez that beginning in the morning of June 30, 2006 he solicited signatures from non-unit employees who wanted to join the Union in order to receive the same benefits as the unit employees. Adames also testified to this effect. I credit Echavarria Gonzalez that he collected about 40 signatures on June 30, July 3 and July 5 during work time on the plant floor and during his breaks in the break room. I credit Echavarria Gonzalez that he saw Udrija watching him while he solicited the signatures and that he complained to the Union about this. Udrija and other witnesses herein testified that in the performance of his duties Udrija is frequently on the production floor so that he can oversee the operation and deal with problems as they arise. I do not

credit Udrija that he was unaware of Echavarria Gonzalez' solicitation of signatures among employees who wanted to join the Union.

The General Counsel urges that Udrija engaged in unlawful surveillance of Echavarria Gonzalez' Union activities. The testimony establishes that in the usual execution of his duties Udrija was often on the plant floor and that he checked the operations of the employees on a regular and consistent basis. The evidence does not show that Udrija increased his normally frequent presence in the production area. That Udrija witnessed Echavarria Gonzalez collecting signatures does not prove unlawful surveillance; it only shows that Udrija was engaged in his job duties by paying attention to what everyone was doing and making sure that production continued without any problems. I shall not find a violation as to the alleged surveillance.

The testimony and documentary evidence set forth above shows that Echavarria Gonzalez was not at work on Saturday July 1, 2006. Nevertheless, Udrija testified that he witnessed him using the power pallet jack in an unsafe manner on that Saturday. Udrija gave Echavarria Gonzalez a written warning on Wednesday July 5 for the supposed safety infraction. Respondent did not seek to deal with this discrepancy. No extended discussion is required to conclude that the written warning for July 1 cannot be used as the basis for further discipline. Since Echavarria Gonzalez was not present in the plant on July 1 and since he cannot have used the power pallet jack improperly on that day, the written warning is a nullity.

I find that Udrija was not a credible or reliable witness based, in part, on his testimony about the purported safety violation of Saturday July 1. Udrija was sure he observed Echavarria Gonzalez on Saturday and he described in great detail the actions of the latter in executing an unsafe maneuver. Before Udrija testified herein he had been told by Jennifer Oldja that Echavarria Gonzalez denied being at work on Saturday July 1, and Oldja and Udrija had discussed production of the payroll records for that date. Yet even though he had an obvious opportunity to search his memory Udrija persisted in his testimony that Echavarria Gonzalez was the employee who performed an unsafe action on Saturday July 1. I conclude that Udrija testified without regard to the accuracy of his statements in order to uphold Respondent's position in the instant litigation.

The uncontradicted testimony shows that when the unrepresented employees confronted Udrija about the bonus he turned red and looked upset. Udrija told them more than once that he had never promised them a bonus. I find that Udrija was upset that these employees were demanding the same bonus that the Union members had received pursuant to the new contract. Because Respondent issued a warning to Echavarria Gonzalez for a day on which he did not work and because Respondent presented testimony that he committed a safety infraction that day even in the face of its own documents showing that he was not working on Saturday July 1, I conclude that the issuance and use of the warning to justify the subsequent discharge was a pretext. I find that Udrija issued the warning dated July 1, 2006 to Echavarria Gonzalez on July 5 2006 because he solicited signatures from employees who wanted to join the Union and receive Union benefits. The warning was given in further-

ance of Respondent's attempt to discharge Echavarria Gonzalez.

Echavarria Gonzalez testified that he notified foreman Blanco that he had to leave at 2:30 on July 5. When Udrija called Echavarria Gonzalez after 4 pm Udrija apparently believed him when he said that he had indeed notified Blanco. Udrija testified that Echavarria Gonzalez did not have a habit of leaving without informing the foreman, and Udrija was prepared to cast the blame on Blanco for failing to assign another worker to cover for Echavarria Gonzalez. By the time Udrija met with Blanco and Echavarria Gonzalez on July 6, however, he readily credited Blanco. Udrija did not explain why he believed Blanco when Echavarria Gonzalez continued to maintain that he had given notice to Blanco. I have found that Echavarria Gonzalez is a truthful witness and I find that Echavarria Gonzalez notified Blanco at 2:30 on July 5 that he could not work late that day.

Udrija's testimony about the decision to discharge Echavarria Gonzalez is inconsistent with the written employee record he prepared. This is another factor in my conclusion that Udrija is not a credible or reliable witness. Udrija testified that he and Alexander Oldja made the decision to terminate Echavarria Gonzalez during the meeting of July 6 "when he started being loud and started walking out and we said as far as we're concerned you're terminated as of today." Yet the employee record prepared by Udrija after the meeting states that termination is due to "your previous warning on file, also due to causing down time on the production line and stating a false statement." This document makes no mention of Echavarria Gonzalez using loud words or beginning to walk out of the meeting. The use of shifting reasons to justify an employee discharge inevitably casts doubt on the truthfulness of the asserted reasons and leads to a conclusion that the employer is covering up an unlawful motive.

Finally, the timing of the bogus safety warning and the discharge of Echavarria Gonzalez soon after he began soliciting employee signatures to join the Union lead me to conclude that he was discharged because of his organizational activities.

I find that Respondent discharged Echavarria Gonzalez on July 6, 2006 because he engaged in Union activities. Respondent thus violated Section 8(a)(3) and (1) of the Act.

Furthermore, Respondent has not shown that it would have discharged Echavarria Gonzalez in the absence of his Union activities. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd, 662 F. 2d 899 (1st cir. 1981), cert denied 455 US 989 (1982). The decision to discharge Echavarria Gonzalez was inconsistent with Respondent's stated disciplinary policy. Udrija testified that "nobody is disciplined for a warning" but if the same problem occurred again the employee would be subject to suspension or termination. In this case, Echavarria Gonzalez was warned for a safety infraction. Then he was subject to discharge for allegedly leaving without informing his foreman that he could not work overtime. Under Respondent's own policy, Echavarria Gonzalez should not have been discharged for leaving at the end of his shift on July 5. Because this was the first time he had been disciplined for engaging in this type of misconduct he should have been issued a warning. Udrija did not testify that unrelated warnings would contribute to a decision to

discharge an employee; Udrija said an employee who was warned would be discharged if the same problem occurred again. I also apply this reasoning to the third cited reason for the discharge, that is, making a "false statement" about whether he had notified his foreman that he had to leave. I note that Udrija admitted that because Echavarria Gonzalez did not have a habit of leaving work without notice Udrija was ready to blame Blanco for the down time on the packing line. Manifestly, Udrija would not have initially credited Echavarria Gonzalez if he had been warned previously for making a "false statement."

Finally, the written warnings issued to other employees before July 6, 2006, show that Echavarria was treated disparately as compared to other employees who engaged in attendance misconduct. On November 26, 2003 an employee who left the packing line for 20 minutes without permission was warned but not fired. On March 27, 2006 an employee who repeatedly did not call and did not appear for work was warned but not fired. Many employees who failed to report to work and failed to call were warned but not fired. On April 12, 2006 an employee who came to work over one hour late without calling, and who had done this before, was warned but not fired. On June 1, 2006, one month before the events at issue herein, an employee who started lunch 17 minutes early, and who had done this before, was warned but not fired. Finally, Adames' uncontroverted testimony showed that he had left work early 4 or 5 times without permission from his foreman and he was not disciplined for doing this. Respondent did not offer any testimony to show how Echavarria Gonzalez' purported infraction differed from the misconduct described above. The evidence establishes that a single instance of misconduct related to attendance at work would not normally be cause for discharge by the company. Thus, I find that Respondent would not have discharged Echavarria Gonzalez but for his Union activities.

CONCLUSIONS OF LAW

1. By discharging Noel Echavarria Gonzalez because he solicited employees to join the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

2. The General Counsel has not shown that Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.¹²

ORDER

The Respondent, Al & John, inc., Paterson, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 464A, United Food & Commercial Workers Union, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Noel Echavarria Gonzalez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Noel Echavarria Gonzalez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Paterson, New Jersey, copies of the attached notice marked "Appendix"¹³ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these pro-

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 6, 2006.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 13, 2008

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 464A, United Food & Commercial Workers Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Noel Echavarria Gonzalez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Noel Echavarria Gonzalez whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Noel Echavarria Gonzalez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

AL & JOHN, INC. D/B/A GLEN ROCK HAM